No. 11952

In the United States Court of Appeals for the Ninth Circuit

WAIALUA AGRICULTURAL COMPANY, LIMITED, A CORPORATION, APPELLANT

v.

CIRACO MANEJA, ET AL., APPELLEES

and

CIRACO MANEJA, ET AL., APPELLANTS

v.

WAIALUA AGRICULTURAL COMPANY, LIMITED, A CORPORATION, APPELLEE

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF HAWAII

BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

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The Administrator of the Wage and Hour Division, United States Department of Labor, is charged with the duty and responsibility of administering and enforcing the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060; 29 U. S. C., sec. 201 et seq.), hereinafter referred to as "the Act." Since this case pre-

sents significant questions concerning the applicability of two of the exemption provisions of the Act, the Administrator with leave of Court, respectfully submits this brief as *amicus curiae.*

STATEMENT OF THE CASE

Since the facts in this case are stated clearly in the findings of fact of the district court (R. 410–437), as well as in the stipulation of facts executed by the parties (R. 129–256), and in their respective briefs, and since the question of the jurisdiction of the district court and this Court is treated adequately in the briefs of the parties, it is deemed unnecessary to include a statement of jurisdiction or a statement of the facts in this brief. The salient points of the decision of the court below are set forth in the three sections of the argument.

This brief will be limited to a presentation of the Administrator's views with respect to the applicability of the Sections 13 (a) (6) and 7 (c) exemptions to various employees of appellant. Because the Administrator has not heretofore expressed an opinion with respect to the Act's applicability to employees engaged in maintaining plantation dwelling houses, no views are here advanced with respect to this issue.

QUESTIONS PRESENTED

1. Which of appellant's employees are "employed in agriculture" as the term "agriculture" is defined in Section 3 (f) of the Act, and are, therefore, exempt from the minimum wage and overtime provisions of the Act under Section 13 (a) (6) thereof?

2. Which of appellant's employees, not so exempt under Section 13 (a) (6), are exempt from the overtime provisions of the Act by virtue of Section 7 (c), which provides that "In the case of an employer engaged * * * in the processing of * * * sugar cane * * * into sugar (but not refined sugar) or into syrup," the overtime provisions of the Act "shall not apply to his employees in any place of employment where he is so engaged"?

3. Does Section 7 (c) exempt any of appellant's employees during the so-called "off-season" when no processing operations are being performed?

4. Whether employees who in the same workweek perform work, part of which is of the type described in Sections 13 (a) (6) or 7 (c) and part of which is covered and not subject to any exemption, are exempt from the overtime requirements of the Act.

STATUTORY PROVISIONS INVOLVED

The provisions of the Act which are directly involved in this appeal are as follows:

> SEC. 3. As used in this Act—
>
> * * * * *
>
> (f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry

or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

* * * * *

SEC. 7 (a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * *

(3) for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

SEC. 7 (c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; * * *.

* * * * *

SEC. 13 (a). The provisions of Sections 6 and 7 shall not apply with respect to * * * (6) any employee employed in agriculture * * *.

ARGUMENT

I

Section 13 (a) (6) of the Act exempts appellant's employees engaged in cultivating, growing, and harvesting sugarcane and processes incidental thereto, including the transportation of cut sugarcane over portable railroad track to the edge of the field on which it is grown but does not exempt its employees engaged in milling operations or in permanent main line railroad transportation

Section 13 (a) (6) excepts from both the wage and hour provisions *"any employee employed* in agriculture" (italics supplied). It is thus like the coverage provisions of Section 7 which refer to *"any of his employees who is engaged* in commerce" (italics supplied) in that it makes the duties of the employee rather than the business of the employer the test of its application. The fact, therefore, that some of appellant's employees are engaged in agriculture does not necessarily subject all of its employees to the exemption, just as the fact that some of an employer's employees are engaged in commerce does not bring all of his employees within the coverage of Section 7. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564.[1]

The statute further provides:

> SEC. 3. As used in this Act—
>
> (f) "Agriculture" includes farming in all its branches and among other things includes the

[1] Compare the similarly worded exemptions provided in Sections 13 (a) (1), 13 (a) (3), 13 (a) (5), and 13 (a) (10), and contrast 13 (a) (4), 13 (a) (9), and 13 (b) (2) showing a choice of different language when it was intended to make exemption depend upon the type of *employer*.

> cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

The court below decided that Section 13 (a) (6) extends complete exemption from the wage and hour provisions to planting seed, promoting growth, harvesting, assembling sugarcane for carriage, and associated activities up to that point, including activities in connection with handling the portable track laid on the fields which are used for cultivation and loading and moving the railroad cars while on that track, but that it does not extend to transportation to the mill on the permanent railroad track nor to milling or subsequent operations. The Administrator concurs with this view.

Appellant contends that all of its 1100 employees including those engaged in the operation of its sugar mill and permanent line railroad transportation system are engaged in agriculture by reason of the following part of the definition: "any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, in-

cluding preparation for market, delivery to storage, or to market or to carriers for transportation to market." It is the Administrator's view that appellant's mill and permanent line railroad transportaiton operations are not "incident to or in conjunction with such farming operations."

As the third largest producer of raw sugar in the Territory of Hawaii, appellant employs directly or indirectly in the manufacture of raw sugar hundreds of highly skilled workers [2] and technicians in its mill and various maintenance and service shops.[3] During the year 1945, appellant's direct sugar manufacturing costs approximated $500,000. Mill production is keyed to a six-day week with around-the-clock operations; the 24-hour day is divided into three 8-hour shifts (R. 183). In the field of transportation, appellant operates a narrow gauge railroad system which includes six 25-ton steam locomotives, one 17-ton steam locomotive, one 12-ton steam locomotive, one 12-ton gasoline locomotive, one 14-ton diesel locomotive, two hundred steel cane cars, and five hundred and twelve

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[2] Appellant has entered into a collective bargaining agreement dated November 19, 1946, with the International Longshoremen's and Warehousemen's Union, Local 145–7, as collective bargaining agent for most of its nonsupervisory employees (R. 136).

[3] Appellant, in addition to operating a warehouse, a steam-power room, and electric-power plant as a part of the mill, also maintains a machine shop (R. 195), a welding shop (R. 196), a blacksmith shop (R. 197), a tinsmith shop (R. 197), a cane-loading machine repair shop (R. 198), a tractor repair shop (R. 199), a garage (R. 200), an electric shop (R. 201), a carpenter shop (R. 202), a paint shop (R. 203), a plumbing shop (R. 203), a laboratory (R. 204), and a concrete products plant engaged in producing concrete irrigation flumes and water supply pipe (R. 206).

wooden cane cars (R. 160). This railroad network consists of fifty-six miles of permanent main line track and slightly more than nine miles of portable track (ibid). For the proper functioning of this railroad system, appellant maintains a roundhouse (R. 163), employs section men to maintain the main line trackage (R. 162), employs ten crossing watchmen to protect the public at government road crossings (R. 163), and utilizes specially trained personnel to operate the trains (R. 162). During the year 1945, appellant expended over $210,000 on transportation, more than fifty percent of which was spent on main-line hauling of sugarcane to the mill (R. 116).

As the sole object of appellant's operation is the production of sugar and molasses and as these are manufactured in its mill, it might be argued that the operation of the mill is the dominant element and that the growing of the raw material, sugarcane, is the subordinate or incidental element. It serves no purpose, however, to attempt to determine which is the dominant element because, to accomplish its purpose of producing sugar and molasses, appellant plainly engages in the many separate and distinct enterprises appropriate to that end, including manufacturing, transportation, and farming. The integration of business operations which appellant has accomplished neither conceals the essential non-agricultural character of appellant's transportation and manufacturing activities nor submerges the economic fact that appellant operates a hybrid type of business which has assumed the functions of manufacturer, carrier, and farmer.

In this, appellant occupies a position with reference to the agriculture exemption analogous to the relationship of a chain store corporation to the "retail * * * establishment" exemption provided in Section 13 (a) (2). As there is no exemption for wholesale establishments, and as the central offices and warehouses of such chains serve the economic function of the wholesaler, the Supreme Court has held that "most chain store organizations are * * * of a hybrid retail-wholesale nature," and has denied the "retail * * * establishment" exemption to such central offices and warehouses. *Phillips Co.* v. *Walling*, 324 U. S. 490, 495. Just as the chain store cannot obtain the retail exemption for its central office and warehouse merely because the services of those units are restricted to exempt retail outlets, so here, appellant should not be able to achieve exemption for its separate carrier and manufacturing undertakings simply because it restricts its carrier and manufacturing functions to the product of its farm.

Nor are all of these "practices" performed "in conjunction with" farming operations, for many of them occur subsequently to and not together with such operations. Processing operations, for example, clearly occur separately from, and subsequently to, the farming operations which produce the raw material for the subsequent activities of the mill. It may be that a more difficult problem is presented by the main-line hauling of sugarcane to the mill, but, for reasons hereinafter presented, it is the Administrator's view that under the facts of this case such hauling is incident to the processing rather than to the farming

operations. In any event, such hauling would not appear to be, as appellant contends, a part of its "harvesting" operations since the "gathering" of crops is completed on the fields on which they are grown prior to transportation on the permanent tracks, and such transportation clearly constitutes neither a "storing" of such crops, nor a transportation to storage. Under the facts here presented, such transportation more clearly appears to be the start of, or incident to, appellant's processing business.

To apply the "agriculture" exemption to appellant's milling and permanent line transportation activities would be to apply in Hawaii a rule at variance with the settled judicial interpretation of the Act which has been applied for years to this country's equally important sugar producing area of Puerto Rico. The Court of Appeals for the First Circuit in the first case presenting the question of the application of the Section 13 (a) (6) exemption to an organization which both grew sugarcane and processed it into raw sugar and molasses held that the exemption did not apply to the processing operation. *Bowie* v. *Gonzalez,* 117 F. (2d) 11 (C. C. A. 1) (1941). The only significant difference between the facts of that case and the one at bar is that there between 30 and 40 percent of the cane processed was grown by independent growers. The court after disposing of the contention (not made here) that the processing operation fell within that part of the definition which exempts the "production * * * of any agricultural * * * commodities", held that the processing did not come within the section of the definition on which appellant

here relies. The court pointed out that the legislative history demonstrates that the purpose of that provision was "to make certain that independent contractors, such as threshers of wheat who travel around from farm to farm to assist farmers in what is recognized as a purely agricultural task should be included within the definition of what are agricultural employees, and also to assist a farmer in getting his agricultural goods to market in their raw or natural state. See 81 Cong. Rec. 7876, 7888." The Court further held:

> Furthermore, it would seem that the employees involved in this case would not fall within the reason for the exemption which was accorded to agricultural employees. The Act was drawn not to include the latter because agricultural labor was not subject to the usual evils of sweatshop conditions of long hours indoors at low wages. Also any attempt to regulate agricultural wages would present a difficult problem since a substantial part of the agricultural workers' income must of necessity be for board and room. The employees in the instant case are typical factory workers or laborers engaged in maintaining industrial facilities. The exemption of agricultural labor from the operation of the Act is not admissible as an argument to exempt labor in an industry from its operation. *Fleming* v. *Hawkeye Pearl Button Co.,* supra; cf. *North Whittier Heights Citrus Assn.* v. *National Labor Relations Board,* 109 F. (2d) 76, 80–81 C. C. A. 9th, 1940). For these reasons we reject the appellants' contention that the employees here involved are engaged in agriculture within the meaning of Sec-

tion 13 (a) (6) and Section 3 (f).[4] [117 F. (2d) at 18.]

While the First Circuit also indicated that the fact that some of the cane processed was grown by independent "colonos" was a ground for holding the processing operation not merely "incidental," the two additional independent grounds of decision quoted above with reference to the legislative history of and reason for the exemption are equally applicable to the case at bar and require the same conclusion.

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[4] Contrary to appellant's inference (Appellant's br. p. 39), the Administrator's recommended legislation to narrow the agricultural exemption with reference to "industrial farms" does not indicate that such of appellant's employees as are engaged in activities which are primarily nonagricultural are exempt under Sec. 13 (a) (6). In his annual reports (Annual Report of the Administrator, 1943–44, p. 8; *id.*, 1944–45, p. 1; *id.*, 1946, pp. 52, 66–68) the Administrator recommended that the Act be extended to cover, and not exempt, hired farm laborers on large industrialized farms, workers who are clearly exempt under the present language of Sec. 3 (f). Such bona fide agricultural workers employed by appellant are concededly exempt under Sec. 13 (a) (6). But the italicized language appearing at p. 39 of appellant's brief indicates nothing more than a recognition by the Administrator that the language of Sec. 3 (f) is broad enough to include employees engaged in activities not primarily agriculture if they are performed by a farmer or on a farm as an incident to farming operations. For example, the building of a grain silo on a farm, whether constructed by a farmer or a building contractor, would be exempt. Neither the language referred to by appellant nor anything else appearing in those reports, however, indicates that the Administrator ever considered such industrialized activities as appellant's processing and incidental operations as exempt under Sec. 13 (a) (6). Neither does such language detract from the weight of the reasoning of the First Circuit, that the industrial nature of this operation is an indication that it was not intended to be exempt as "agriculture."

The significance of these two additional grounds became evident in the case of *Calaf* v. *Gonzales,* 127 F. (2d) 934 (C. C. A. 1) which dealt with the application of the "agriculture" exemption to employees working on railroad transportation facilities used to transport cane to a sugar mill. The mill, the railroad, and some of the farms on which the cane was grown were all owned jointly by the defendants. Though the railroad was also used to transport cane grown on farms owned severally by the defendants and on one farm owned by an independent "colono," the court expressly refused to base its decision on this fact. It stated, "We place our decision, however, on the broader ground that the transportation of sugarcane is incident to milling rather than to farming and therefore is not exempt under the Act" (127 F. (2d) at 936–937) and proceeded to give reasons for its conclusion just as though this fact on which appellant relies to distinguish the case did not exist. Thus, it stated that "The mere fact that in this case the owners of the farms are also the owners of the mill and the transportation facilities does not make transportation an incident to farming," (id. at 937) and "There seems no rational basis for saying that simply because the ownership of the mill and the farms is in the same hands that, therefore, those employees who are engaged in an activity which is separate and distinct from agriculture are exempt from the provisions of the Act" (id. at p. 938). It follows, of course *a fortiori* that since the exemption is inapplicable to transportation workers because transportation is in-

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cident to milling rather than farming, it is also inapplicable to mill employees under the same circumstances.

The reasons announced in the *Bowie* case, which support the argument that the agriculture exemption should be denied mill employees regardless of the ownership of the farm lands, and the rationale of the *Calaf* case specifically putting such considerations aside in the field of transportation, have also found expression in a case where, like the case at bar, one employer owned all the farm lands, the transportation facilities, and the mill (*Vives* v. *Serralles,* 145 F. (2d) 552 (C. C. A. 1). There the "concentration point" is indicated as the place where the agriculture exemption ends. The "concentration point" is fixed with reference to the three types of transportation that were used on the growing fields. One of these types was practically identical with the transportation system used in the case at bar. It is described by the Court as follows:

> The cane is hauled to the concentration point in various ways; in small railroad cars pulled by oxen over portable tracks to a siding or switch where the cars are picked up by locomotives operated on the permanent tracks; * * * [145 F. 2d. at 553]

Except for the inconsequential detail that appellant used tractors rather than oxen in that part of the transportation which occurred in the growing fields over portable tracks, appellant's system of rail transportation is identical (R. 161).

The reasons which led the Court of Appeals for the First Circuit to fix the point at which the portable

tracks meet the permanent tracks as the dividing line between activities which are exempt under Section 13 (a) (6) and activities which are not, are equally applicable to the case at bar. In the *Serralles* case it was pointed out that the wages of laborers in the field engaged in operations up to the "concentration point" were regulated by the Secretary of Agriculture, under The Sugar Act of 1937 (50 Stat. 903; 7 U. S. C. § 1100 et seq.). The need for a clear dividing line between the coverage of the two Acts, therefore, suggested the concentration point as a useful point of cleavage. The fact that this point also marked the end of the "harvesting" operation according to the interpretation of the Administrator and the view of the court was regarded as decisive. These facts and considerations are equally applicable to the case at bar.

In holding transportation incident to milling, the court in the *Calaf* case pointed to certain factual "guides" which were felt to have compelling force in reaching that decision. The court deemed it significant that the workers were all employed by the mill and had their names on the mill payroll, that the locomotives and cars had their depot at the mill and moved from the mill to the fields and back, and that the persons engaged in the transportation of sugarcane did not engage in agricultural work (see 127 F. (2d) 937). In the instant case, similar facts are present. Employees engaged in mainline transportation activities are specially skilled workers under the general supervision of the Cane Processing Superintendent rather than the Field Superintendent (R. 234–235), and do not engage in agricultural work in the fields (R. 162–

163). On the other hand, employees operating portable track plows, portable track lifting machines, cane-loading machines, and haul cane tractors are under the general supervision of the Field Superintendent and work in the fields (R. 230–233). The locomotives and empty cars move from the mill to the fields, and return to the mill with sugarcane for processing (R. 161). Railroad car and locomotive maintenance occurs not in the fields but at the plantation roundhouse and in a space adjacent to the plantation machine shop, an area devoted to milling and other nonagricultural operations (R. 234). Furthermore, appellant's bookkeeping accounts showing that both processing and transportation expenses are considered separate and distinct from those charged to field activities, such as cultivation and harvesting (R. 116), indicates that employees engaged in processing and transportation are carried on pay rolls other than the one used for field employees. These factors, we submit, are equally compelling here.

We agree with the comment in appellant's brief (p. 46) that the statement in the *Calaf* case (127 F. (2d) at 937, 938) that "We would be presented with a very different problem if the evidence disclosed that the heart of the transportation system and the situs of the employment of the workers were located at the farm" related to the situation subsequently presented to the same court in the *Vives* case. That case, however, exempted only workers whose work related to that part of the transportation which took place on the growing fields and did not extend to any transportation on permanent railroad lines. The permanent line

transportation here is not "on the farm" in this sense as appellant argues. While it takes place on the "plantation," that word is defined in the stipulation simply as the geographical area (9,663 acres) on which appellant "is producing sugarcane, processing it into raw sugar and conducting related operations" (R. 130). It is obvious that cane cannot be grown on the right-of-way occupied by appellant's 56 miles of permanent mainline railroad track, whereas it can be and is grown on the fields on which the portable track is laid at harvest time in the *Vives* case and this case. The point where the two join should be held to be the point where the "agriculture" exemption ends in this case just as it was so regarded in the *Vives* and *Calaf* cases.

The view adopted by the decisions of the First Circuit Court of Appeals and urged herein became at an early date and has long remained the official position of the Administrator. In an effort to represent the contrary, appellant cites the statements in the Administrator's interpretative Bulletin No. 14, that the transportation of cane by the grower to his mill might be considered incident to growing and that the manufacture of raw sugar in the mill in such circumstances might be considered as preparation for market. That document, issued in 1939, was a general discussion of all of the many ramifications of Sections 7 (c), 13 (a) (6) and 3 (f), and 13 (a) (10). Prefatory to all of its discussion, it expressly stated "This bulletin will set forth the construction of these sections which will guide the Administrator in the performance of his administrative duties *unless he is*

directed otherwise by authoritative rulings of the courts or unless he shall subsequently decide that his prior interpretation is incorrect." (Italics supplied) 1940 ed. W. H. Manual p. 180. Accordingly, as early as September 1941, after the authoritative decision in the *Gonzalez* case, the Administrator withdrew his interpretation that "manufacturing raw sugar" might possibly be included within the term "preparation for market" contained in Sec. 3 (f). In Release R–1568, published in 1942 ed. W. H. Manual p. 408, it was stated that in the light of that decision "it appears that the Wage and Hour Division went too far in expressing the view * * * that if a sugar mill owner grinds only the cane which he grows himself the exemption for agricultural employees may possibly apply under some circumstances to his mill employees." "It would seem," the Administrator stated, "from the court's decision [in the *Bowie* case] that the exemption for agricultural employees * * * does not apply to sugar mill employees, even if the only cane ground in such a mill is cane grown by the sugar mill owner in his own fields" (ibid.). Since that time this view has been consistently expressed to members of the public who have sought advice and guidance from the Administrator with respect to the Act's applicability.

Contrary to the statement in appellant's brief (p. 47), the Administrator's view as expressed in Par. 10 (f) of Interpretative Bulletin No. 14, to the effect that the transportation by a mill owner to his mill of sugarcane he grows may be exempt under Section 13 (a) (6) has been modified, although it does not

appear that such modification was ever specifically or formally published as a change in the Interpretative Bulletin. However, in the Administrator's Release G–322 dated May 20, 1943, published incident to his approval of the Wage Order Part 635, for the Sugar and Related Products Industry, 8 F. R. 7098, 1944–1945 W. H. Manual 347, and in the transcript of the proceedings of the Industry Committee therein mentioned, it appears that the representative of the Hawaiian Sugar Planters Association objected to the definition of the industry contained in the Order because it appeared to include transportation workers among those entitled to the minimum wage. He advanced substantially the same argument with reference to exemption that appellant here advances. The Administrator overruled this objection on the ground that the Order would not in any event apply to anyone who was exempt under Section 13 (a) (6). He stated that whether certain individuals were exempt would be a question of fact to be determined upon the basis of all the evidence and the applicable rules of law. In this connection he specifically called attention to the *Calaf* decision, which he construed as holding the exemption "inapplicable to employees engaged in transporting sugarcane from their employer's farm to their employer's sugar mill even though the cane was grown by the employer of the employees in question." That the Administrator had adopted the *Calaf* decision as his interpretation notwithstanding possible contrary implications in Interpretative Bulletin No. 14, is further illustrated by the following paragraph of a letter from Mr. William B. Grogan, acting for

the Administrator, to Mr. Paul E. Guillot, Dugas & LeBlanc, Ltd., Paincourtville, Louisiana, dated November 26, 1942:

> It appears that you already have a copy of Interpretative Bulletin No. 14. The first 13 paragraphs of that bulletin set forth the Administrator's interpretation of the scope of section 13 (a) (6) of the Act. However, the recent decision of the United States Circuit Court of Appeals in *Calaf* v. *Gonzalez,* 127 F. (2d) 934 (C. C. A. 1), indicates that the mere fact that owners of sugarcane farms are also owners of a sugar mill and transportation facilities does not make transportation of the cane from the farms to the mill "incident to farming" and therefore exempt under section 13 (a) (6). Therefore, your employees engaged in transporting cane from the fields to the mill are not exempt under section 13 (a) (6) of the Act. Except for the qualification just referred to, I believe that the first 13 paragraphs of bulletin 14 will enable you to determine which of your employer's employees are engaged in "agriculture" and therefore within the scope of the section 13 (a) (6) exemption, and thus exempt from both the minimum wage and overtime provisions of the Act.[5]

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[5] The principles which the Administrator feels should be applied in determining whether transportation is incident to farming or milling were stated more precisely in letter dated October 9, 1946 (written sometime prior to the institution of the instant suit), from the Deputy Administrator to Mr. James Marshall, Director of the Sugar Branch, Production and Marketing Administration, United States Department of Agriculture, in which it was stated: "There are situations in Puerto Rico, however, where the farm and centrale are under common ownership. The mere fact that

The language of the statute, the requirement of strict construction, the legislative history, the eco-

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the owner of the sugar centrale also owns a farm would not necessarily mean that transportation from the farm to the mill is 'incident to farming' and therefore exempt under section 13 (a) (6). In such a situation, it becomes a question of fact whether the truckers are employed by the plantation in work incidental to farming operations, so that they would be exempt under section 13 (a) (6), or whether they are employed by the centrale in work incidental to milling operations which would not be exempt. In deciding this question the Divisions have adopted the tests used by the court in *Calaf Collazo* v. *Gonzalez*, 127 F. (2d) 934. Thus, where the employees on the farm pay roll, report to the farm for instructions and at the end of the day, are generally supervised from the farm, perform agricultural work on the farm, and where the trucks are stored and maintained on the farm—these are factors indicating that the employees are performing work which is an incident to the farming operations. On the other hand, where the employees are on the mill pay roll, are supervised from and report to the mill, and perform other work at the mill, these factors would indicate that the work of the employees is incidental to the milling operations."

Appellant's discussion of the Administrator's position without mention of such opinion letters is perhaps understandable in view of the fact that they do not appear to have been made the subject of a press release nor were they printed in the commercial labor law reporting services. This brief does not deal with the question whether or to what extent appellant may be held liable if appellant was in fact unaware that the Administrator took the position expressed in these letters, and relied on the statement in the Bulletin, notwithstanding the *Calaf* decision and the Administrator's reference to that decision in the Wage Order proceedings. These factors would have pertinence in determining liability to employees under Section 16 (b) of the Act for wages due them for their past employment, in connection with the "good faith" element in defenses which might be raised under Sections 9, 10, and 11 of the Portal-to-Portal Act of 1947. The fact, however, that these letters may not have come to appellant's attention in the past does not detract from their pertinence, particularly in this litigation where appellant seeks the declaratory judgment of the Court for its guidance in its future operations.

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nomic facts, the well-settled judicial rule, and the administrative interpretation of long standing, all point, therefore, to the conclusion that Section 13 (a) (6) of the Act exempts appellant's employees engaged in producing sugarcane and processes incidental thereto, including the transportation of cut sugarcane over portable railroad track to the edge of the field on which it is grown, but does not exempt its employees engaged in milling operations or in permanent main-line railroad transportation.

II

Employees engaged, during the grinding season, in hauling, repair, and maintenance activities at the "place of employment" where appellant is engaged in "processing" of sugarcane are exempt from the overtime provisions of the Act by virtue of Section 7 (c). But employees engaged in such activities elsewhere than at such "place" of "processing," or during the "dead season," are not exempt under Section 7 (c)

Section 7 (c) provides that "In the case of an employer engaged * * * in the processing of * * * sugarcane * * * into sugar (but not refined sugar) * * * [the overtime provisions of the Act] shall not apply to his employees in any place of employment where he is so engaged." This exemptive provision was held by the court below to be applicable only to those of appellant's employees who were engaged in processing activities or in activities incidental thereto at appellant's mill during the time that cane processing operations were actually being conducted or during temporary break-downs with the operating staff present and awaiting completion of the repairs (R. 442–444). To the extent that the decision of the

district court denies the exemption during the processing season to employees engaged in hauling who perform some duties at the mill, as, for example, unloading of sugarcane, and to employees engaged in shipping raw sugar out of appellant's sugar warehouse which is connected by a conveyor belt to the mill building (R. 185), that decision excludes from the exemption employees who, in the Administrator's opinion, are reasonably within its scope. Further, the holding of the court below that the exemption is inapplicable during the temporary 24-hour weekend shut-down for routine maintenance restricts the scope of the exemption more narrowly than the Administrator has construed it. However, the Administrator believes the decision below correctly held the exemption inapplicable to transportation, repair, and maintenance, employees not engaged at the "place of employment" where their employer is engaged in processing sugarcane, and that appellant's claim of exemption under 7 (c) for all employees not found exempt under Section 13 (a) (6) (appellant's brief, p. 51) cannot be sustained.

a. While some of appellant's transportation, repair and maintenance employees are engaged in "processing" activities within the meaning of Section 7 (c) at the "place of employment" where appellant is engaged in the "processing" of sugarcane, other transportation, repair and maintenance employees are not so engaged

Appellant's contention rests upon two assumptions: (a) that insofar as appellant is not held to be engaged in producing sugarcane, it must be held to be engaged in processing cane into raw sugar or in activities necessary and related thereto (appellant's brief, p. 53), and (b) that all of the employees not found

exempt under Section 13 (a) (6) "work on the same premises where their employer is 'processing * * * sugarcane * * * into sugar'" (appellant's brief, p. 54). Neither assumption, we submit, finds support in the terms of the exemptive provision. A number of appellant's employees, as shown by the stipulated facts, are engaged in some activities which are not closely and directly related either to the production of sugarcane or to the processing of sugarcane into sugar; in other instances employees work at a "place of employment" elsewhere than where appellant is engaged in the processing of sugarcane into sugar.

While the legislative history of Section 7 (c) is clear enough as to the general purpose underlying the granting of the exemption,[6] it affords little aid in determining the precise breadth and applicability of the exemption granted by the particular language adopted by the Congress.[7] The applicability of the exemption must be determined by the "normal and spontaneous meaning of the language" (*Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 524) which the Congress chose to define the class of persons exempted. From the plain language of Section 7 (c), the exemptive provision is

[6] "It was the purpose of Congress, in granting this exemption [Section 7 (c)] to enable the employer to avoid the burden of time and one-half for overtime in those seasonal or peak periods when he must work to take care of the product on the market, the amount of which depends upon factors beyond his control." *Walling* v. *Swift & Co.*, 131 F. (2d) 249, 251 (C. C. A. 7).

[7] The legislative history cited by appellant (brief, p. 56) merely demonstrates that an exemption is granted to sugarcane processing—which is obvious from the language of section 7 (c)—but it is of no avail in determining what is the scope of "processing" or "place of employment where he is so engaged."

applicable, first, only in the case of an employer engaged in a described operation (in the instant case, processing of sugarcane), and, second, only as to those of his employees who work in a "place of employment where he is so engaged." Obviously, the exemption is not co-extensive with *all* of the activities that may be undertaken by an employer who *inter alia* engages in the processing of sugarcane. To be within the exemption the employees must be engaged in the operations described in Section 7 (c) (i. e., processing of sugarcane), or in operations that are a necessary incident to the described operations and, in addition, they must be working in such operations *in* the "place" where their employer is engaged in such processing. On the other hand, employees who work in a "place of employment" where their employer is *not* engaged in the actual processing of sugarcane albeit he may at that place be engaged in activities which, in a broad sense, may be incidental or necessary to such processing, are not within the terms of Section 7 (c).

Appellant argues that the "place of employment where he is so engaged" can include appellant's whole "plantation" which is defined in the stipulation as comprising the geographical area on which appellant produces sugarcane, processes it into raw sugar, and performs related operations (R. 130). The same reasons heretofore advanced to demonstrate that this entire enterprise is not a "farm" make it equally clear that all the various buildings and premises comprising the "plantation" cannot reasonably be deemed the "place" where appellant is engaged in the process-

ing of sugarcane. Appellant's contention reads out of the exemptive provision the phrase "where he is so engaged" which seems clearly intended to limit the exemption to employees working in the particular "place" *in* which the employer is actually engaged in the processing operations. When such a "place" is an establishment exclusively devoted to operations specifically mentioned in Section 7 (c), every employee working in such a plant ordinarily will be either actually engaged in the described operations, or in an occupation so closely integrated and incidental to the described operations as to be virtually a part thereof, and moreover all will be working solely in the place or portion of the premises devoted by the employer to such operations. Thus, where a sugar mill is exclusively engaged in processing sugarcane into sugar all employees who work solely in the mill, of course, come within the scope of the exemption. In such a case, where contiguous buildings or areas located on the same premises and operated as a unitary establishment devoted to the described operations constitute a single "place of employment," the entire establishment is a "place of employment where he is so engaged."[8] On the other hand, where only certain

[8] It would seem clear, as a correlative concept, that even though contiguous and located on the same premises, several buildings or areas are not always or necessarily component parts of a single place of employment. For example, a contrary conclusion would appear proper where any such building or area is organized and operated as a self-sufficient unit and the operations performed therein are performed independently of operations in the surrounding buildings or areas. Thus, in doubtful cases, factors other than geographical contiguity, such as interchange of person-

departments, areas, or buildings within an employer's premises are devoted to the described operations, the remaining departments, areas, or buildings cannot be deemed to be part of such "place of employment" without doing violence to the statutory language and the firmly established rules of statutory construction.

The foregoing views are fully supported by the decision in *Fleming* v. *Swift,* 41 F. Supp. 825 (N. D. Ill.), affirmed 131 F. (2d) 249, which is the judicial authority most directly in point on this issue. The Swift Company was engaged in acquiring and slaughtering livestock and in the processing, manufacturing, and distributing of meat, meat products, and byproducts from livestock. Concluding that the description of operations and processes in Section 7 (c) places "a functional limitation on the classes of employees for whom an exemption from the overtime provisions may be claimed," the court held that the exemption applied on a department basis and not to defendant's whole plant. 41 F. Supp. 831. Thus the court carved out for exemption only those departments of the meat-packing plant in which "handling," "slaughtering," and "dressing" operations were performed and held that the portions of the plant devoted to those operations constituted the "place of employment," and that employees in other departments, such as those devoted to meat-curing or sausage-making, were not within the scope of the exemption. To the same effect, see *Walling* v. *Bridgeman-Russell,* 2 W. H. Cases 785 (D. Minn.); *Colbeck* v. *Dairyland Creamery Co.,* 17 N. W.

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nel, flow of raw materials, payroll records, and techniques of supervision of the employees may have to be considered.

(2d) 262 (S. Ct. S. D.); *Shain* v. *Armour & Co.,* 50 F. Supp. 907 (W. D. Ky.); *Walling* v. *De Soto Creamery & Produce Co.,* 51 F. Supp. 938 (D. Minn.). The *Bridgeman-Russell* case involved an establishment in which the processing of butter and cheese as well as other activities not within the scope of the Section 7 (c) exemption occurred. Holding that maintenance employees in that establishment were not exempt, the court stated (*id.* at 790):

> "* * * Place of employment" means those portions of an establishment devoted by the employer to first processing operations * * * [and] the exemption is applicable to any employees who perform exclusively the operations described in this Section, and * * * employees who * * * are engaged exclusively in operations which are a necessary part thereof and perform such duties in those portions of the premises devoted by the employer to "first processing" operations.

Subsequent to the decision in the *Swift* case, the Administrator issued Release R–1892, dated January 1943, a copy of which is attached as an Appendix, setting forth at length the Administrator's views on the scope of the exemption. It was there stated that in the Administrator's opinion "the section 7 (c) exemptions are applicable to the following two groups of employees: (1) Those who actually perform the operations described in the section, and (2) those employees whose occupations are a necessary incident to the described operations, and who work solely in those portions of the premises devoted by their employer to the described operations." And, as appellant points

out, the Release further stated that "when an establishment is *exclusively* engaged in activities enumerated in the section [7 (c)] all of the employees of the operator of the establishment who work solely in that establishment * * * come within the scope of these exemptions * * *." [Italics supplied.] In accordance with this interpretative position, appellant's employees engaged at the mill in activities that directly, or as a necessary incident constitute the processing of sugarcane are within the scope of the exemption. And, further, the Administrator believes that it appears proper and reasonable to include within this exempt classification employees who are engaged in shipping raw sugar out of the sugar warehouse which is connected by a conveyor belt to the mill building itself (R. 185), since operations there performed are, for all practical purposes, a necessary incident to the processing of cane, and the physical relationship between the warehouse and the mill is such that it may be regarded as part of the same place where appellant is engaged in processing operations.

While we believe the court below was in error in denying the Section 7 (c) exemption to all of the employees engaged in the transportation of sugarcane to the mill, appellant appears to have oversimplified the problem presented when it argues that all of these employees are necessarily exempt under Section 7 (c) as engaged in operations incident to processing. Even assuming that they all are so engaged, nevertheless the question still remains whether they work at a "place of employment" where their employer is en-

gaged in the processing operations. Clearly, some transportation employees do not. Transportation employees, for example, whose duties are performed in areas far removed from the mill and the processing operations, such as track maintenance men and guards at grade crossings, are not employed in a "place of employment" where their employer is engaged in the processing operations. On the other hand, transportation employees who perform some duties at the mill as, for example, the unloading of sugarcane, may reasonably be said to be engaged in the "place of employment" where the appellant engages in processing, within the scope of the exemption. As it is clear from Part I of this argument that their work is incident to processing and thus also satisfies the other requirement for exemption under Section 7 (c), the decision of the court below, to the extent that it denied the exemption to such employees, is contrary to the interpretation the Administrator has followed.

In many of the other buildings or areas utilized by appellant, however, such as the maintenance shops, not only are the premises not devoted to the performance of the operations described in Section 7 (c) but portions of these premises are actually devoted to occupations not closely or directly related to the processing activity which is the subject of the exemption. Thus, the repair and maintenance shops service the transportation facilities as well as the mill. Employees engaged in this type of activity are at best only partially engaged in activities incidental to processing; but they are not employed in a "place of employment" where the operations described by Section

7 (c) are performed, and, therefore, we believe were correctly held outside the scope of the exemption.

b. Employees who are within the scope of the Section 7 (c) exemption during the processing season continue exempt during week-end and other short shut-downs, but are not so exempt during the "dead season"

The district court held that the Section 7 (c) exemption is inapplicable to employees engaged in mill repair and maintenance work during the "dead season," a period of approximately three months each year when processing operations have been definitely suspended and major maintenance and repair activities are undertaken, and, also, to employees similarly engaged during the week-end shut-down. The "dead season" ruling, we submit, is consistent with the legislative purpose of Section 7 (c), and in accord with judicial authority. But the holding that the exemption is inapplicable during the 24-hour week-end shutdown is contrary to the Administrator's view.

While employment in the "place" where the processing is carried on is a necessary condition to the applicability of the exemption, the words "place of employment," as appellant contends (br., p. 66), are not the controlling words in determining the applicability of the exemption during the dead season. The language of the section is clear that the exempt employees must be employed in a "place" where the employer *is* engaged in one of the processing operations. But it is not enough that the "place" is devoted to activities related in some way, or necessary, to processing which may ultimately take place; it is also essential that at the time these activities occur, the employer *is* engaged in processing. During the

"dead season," however, when processing operations are completely and definitely suspended for a period of approximately three months, it is stretching the statutory language considerably to conclude that the processing operations are being engaged in by appellant. See *Maisonet* v. *Central Coloso, Inc.,* 2 W. H. Cases 753 (D. P. R.). In the *Maisonet* case the issue was squarely presented whether the employees were entitled to receive overtime pay during the dead season. The court, in holding that the exemption was inapplicable, since their employer was not engaged in processing at that time, noted that the economic conditions with which the exemption is supposed to be concerned do not obtain during the dead season, and that the mill could easily spread employment sufficiently during that season so as to avoid the necessity of overtime work. To the same effect, see *Heaburg* v. *Independent Oil Mill, Inc.,* 5 Wage Hour Rept. 777 (W. D. Tenn.), in which the court pointed out that "the 'dormant' season activities * * * such as maintenance, repair, clerical, and sales work while incidental to and connected with the defendant's business of the 'processing of cottonseed' is not 'processing' within the intent of the Act and is not sufficient to bring the employer within the exemption 7 (c) during such period." See also *Abram* v. *San Joaquin Cotton Oil Co.,* 6 Wage Hour Rept., 312 (S. D. Calif.).

As in the cases cited above, appellant's three-month "dead season" is a period devoted to repair and maintenance work on a vast scale, designed perhaps more to safeguard its capital investment and for the installation of improvements (R. 212–213) than to in-

sure the uninterrupted functioning of the mill during the harvest season. On the other hand, the maintenance and repair work performed during the 24-hour week-end shut-down which occurs weekly during the grinding season is primarily concerned with keeping the mill operating at a time when the processing operations must be carried on with a minimum of interruption. These activities, therefore, are very closely related, in time as well as functionally, to the actual processing operation itself. The district court's decision with respect to the week-end shut-down appears to prove too much. Carrying the district court's view to its logical conclusion, the exemption would become inapplicable during any period in which the processing operation was suspended, however temporary such a period may be. In effect then, repair and maintenance employees would never be exempt under Section 7 (c), a result we do not believe contemplated by either the language or purpose of the exemption.

The Administrator has consistently expressed the opinion that the Section 7 (c) exemption is inapplicable during the "dead season." See Release R–1892, Appendix, infra, p. 45. The statements attributed to him and the Secretary of Labor (see appellant's brief, p. 68) that the Section 7 (c) exemption is a "52-week overtime exemption" is not, as appellant suggests, irreconcilable with his position that "dead season" work is nonexempt, for it is clearly implicit in the language of these statements that they are based on the premise that processing operations are being conducted during the entire year. If they

are, then the exemption is an "absolute" year around exemption. But where, as here, they are not, then the exemption is applicable, in the language of the provision, only during such seasons as the employer *is* engaged in processing operations.

III

When an employee in the same workweek performs both work exempt under Section 13 (a) (6) or Section 7 (c) and covered nonexempt work, he is entitled to receive the minimum wage and overtime benefits of the Act

The Administrator believes that the decision below correctly held that an employee is entitled to the minimum wage and overtime benefits of the Act for work performed in any workweek in which he performs both exempt and covered nonexempt work. Appellant's contention that since "an insubstantial amount of engagement in commerce or the production of goods for commerce are insufficient to subject an employee to the Act, if follows that an insubstantial amount of nonexempt work should not defeat the application of an exemption otherwise applicable" (br., p. 71) is directly contrary to the firmly established rules of statutory construction that the coverage of remedial legislation is to be broadly interpreted so as to be inclusive rather than exclusive whereas exemptions from such legislation are to be strictly construed. *Phillips Co.* v. *Walling,* 324 U. S. 490; *Consolidated Timber Co.* v. *Womack,* 132 F. (2d) 101 (C. C. A. 9); *Fleming* v. *Hawkeye Pearl Button Co.,* 113 F. (2d) 52 (C. C. A. 8). Equally lacking in merit is appellant's other contention that a denial of a tolerance for nonexempt work is without justification. In view of the

breadth of Sections 13 (a) (6) and 7 (c), which extend exemption not only to those directly engaged in the operations specifically mentioned, but to others whose work is "incident to or in conjunction with" such operations (Section 13 (a) (6)) or who perform incidental work in the same place of employment (Section 7 (c)), there is no occasion to broaden them further by a "tolerance" allowance.

In refusing to "extend an exemption to other than those plainly and unmistakably within its terms and spirit" (*Phillips Co.* v. *Walling,* 324 U. S. 490, 493), the courts have uniformly refused to interpret exemptions in such a manner as to exempt activities which Congress obviously did not intend to exclude from the scope of the Act. The problem has usually arisen, as in the instant case, where both exempt and nonexempt activities are involved. Thus where exemptions have been provided for "any employee" of designated types of employers, the courts have held that if the employer engages in activities other than those intended to be exempted, employees in the nonexempt phase of his business are not exempt despite the literal wording of the exemption. *Walling* v. *Connecticut Co.,* 154 F. (2d) 552 (C. C. A. 2); *Davis* v. *Goodman Lumber Co.,* 133 F. (2d) 52 (C. C. A. 4); *Wabash Radio Corp.* v. *Walling,* 162 F. (2d) 391 (C. C. A. 6); *Western Union Telegraph Co.* v. *McComb,* 165 F. (2d) 65 (C. C. A. 6); *Nelson* v. *Agwilines,* 70 F. Supp. 497 (S. D. N. Y.); *Jackson* v. *Northwest Airlines,* 70 F. Supp. 501 (D. Minn.). And if exempt and nonexempt characteristics of a business are so intermingled as to be

inseparable, the exemption will be denied entirely. *Collins* v. *Kidd Dairy & Ice Co.,* 132 F. (2d) 79, 80 (C. C. A. 5); *Guess* v. *Montague,* 140 F. (2d) 500, 503 (C. C. A. 4); *Wood* v. *Central Sand & Gravel Co.,* 33 F. Supp. 40, 47 (W. D. Tenn.). See *Phillips Co.* v. *Walling,* 324 U. S. 490, 496. Similarly, where exemptions depend on the particular duties performed by employees, the performance of both exempt and non-exempt activities by an employee in the same work-week results in the loss of the exemption. *North Shore Corp.* v. *Barnett,* 143 F. (2d) 172 (C. C. A. 5); *Anderson* v. *Manhattan Lighterage Corp.,* 148 F. (2d) 971 (C. C. A. 2); *Shain* v. *Armour & Co.,* 50 F. Supp. 907 (W. D. Ky.); *Walling* v. *DeSoto Creamery & Produce Co.,* 51 F. Supp. 938 at 943 (D. Minn.); *Fleming* v. *Swift & Co.,* 41 F. Supp. 825 (N. D. Ill.); *Walling* v. *Peacock Corp.,* 58 F. Supp. 880, 883 (E. D. Wis.); *Sykes* v. *Lochmann,* 156 Kan. 223, 132 P. (2d) 620; *Jordan* v. *Stark Bros. Nurseries,* 45 F. Supp. 997; *Walling* v. *Bridgeman-Russell,* 2 W. H. Cases 785 (D. Minn.); *Loeb* v. *Ideal Packing Co.,* 7 Wage Hour Rept. 397 (Wis. C. C., Mil. Co., 1944); *Gaskin* v. *Clell Coleman & Sons,* 5 Wage Hour Rept. 581 (Ky. C. C. Mercer Co., 1942).

The operation of the above rule in a case involving the Section 7 (c) exemption is well illustrated by the decision in *Shain* v. *Armour & Co., supra.* Although the major part of the plant's activities were devoted to the processing of butter and the employer therefore contended that all of his employees were exempt, only those employees "as devote their time *exclusively* to

the first processing of cream into butter" were held to be within the exemption (6 Wage Hour Rept. 715). [Italics supplied.] And, the court specifically denied the exemption to employees who "devote part of their time during the workweek to duties other than the first processing of cream into butter" (*ibid*). Similarly, in *Walling* v. *Bridgemen-Russell, supra,* the Section 7 (c) exemption was only deemed applicable to employees "who perform exclusively the operations described in this Section" (2 W. H. Cases at 790), and once again, the exemption was specifically denied if "during any part of the workweek, the employee performs duties which do not fall within the scope of the exemption" (*ibid*). To the same effect in additional cases involving the Section 7 (c) and Section 13 (a) (6) exemptions, see *Fleming* v. *Swift & Co., supra; Jordan* v. *Stark Bros. Nurseries, supra; Walling* v. *DeSoto Creamery & Produce Co., supra; Walling* v. *Peacock Corp., supra; Sykes* v. *Lockmann, supra;* and *Loeb* v. *Ideal Packing Co., supra.* For similar rulings with respect to other exemptions, see *North Shore Corp* v. *Barnett,* 143 F. (2d) 172 (C. C. A. 5) (employee engaged as telephone switchboard operator within meaning of Section 13 (a) (11), who also performed other duties of a nonexempt nature); *Anderson* v. *Manhattan Lighterage Corp.,* 148 F. (2d) 971 (C. C. A. 2). See also *Wabash Radio Corp* v. *Walling,* 162 F. (2d) 391, 394 (C. C. A. 6).

Thus, the courts have recognized that if more than lip service is to be paid to the principle that "any exemption from [this] humanitarian and remedial leg-

islation must * * * be narrowly construed" and not extended "to other than those plainly and unmistakably within its terms and spirit" (*Phillips Co.* v. *Walling,* 324 U. S. 490, 493), exemptions cannot be held applicable to an employee or an employer simply because he engages in some exempt work if he also engages in other work which Congress clearly intended to subject to the statutory standards. Any other interpretation would open the door wide to evasion of the purpose of the Act to eliminate substandard labor conditions. It would result in cutting across and absorbing into the exemptions parts of industries and activities plainly covered by the Act, simply because the same employees or employers happened to engage in several kinds of activities.

The position taken by the courts in the foregoing cases and by successive administrations over a period of years (see Interpretative Bulletin No. 14, par. 37, p. 22) accords with the evident intent of Congress in defining with extraordinary particularity the scope of the exemptions here in question. Congress did not merely exempt by Section 13 (a) (6) employees "employed in agriculture." It went further, and, in Section 3 (f) gave a very detailed definition of agriculture which included not only traditionally agricultural activities but also "any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations." This language in itself provides a very broad tolerance for activities which are not of a strictly agricultural nature. In addition, Congress provided other exemptions for related processing activities in

Sections 7 (c) and 13 (a) (10) of the Act. The legislative history indicates that these exemptions were considered together and were intended to be a comprehensive and exclusive list of the activities in this field which Congress desired to exempt. As the courts have also emphasized, all the sections relating to these exemptions "are in *pari materia* and must be construed together to form a consistent whole, if possible." *Bowie* v. *Gonzalez,* 117 F. (2d) 11. Applying these established principles, it seems clear that the detailed language of the statute is so explicit with regard to the scope of the exemption for employees employed in agriculture that no additional tolerance for nonagricultural work can be justified if the intention of Congress is to be given effect.

The situations cited by appellant where the Administrator has allowed a tolerance for nonexempt work are distinguishable from those presented by the exemptions provided in Sections 7 (c) and 13 (a) (6) which are involved in this case. The cases cited in footnote 1 in Appendix E to appellant's brief deal with the Section 13 (a) (1) exemption which expressly grants the Administrator the power to define by regulation the exempt classifications which are merely identified in the Act only in the most general terms. As the tolerances are expressly provided in the regulation, no question of judicial interpretation is presented, and the cases cited by appellant in connection therewith are not in point.

The cases of *Morris* v. *McComb,* 332 U. S. 422; *Pyramid Motor Freight Corp.* v. *Ispass,* 330 U. S.

695, and *Levinson* v. *Spector Motor Co.,* 330 U. S. 649, are also inapplicable because they arise under the exemption provided in Section 13 (b) (1) which depends for its application upon whether the activities of an employee come within the jurisdiction of another governmental agency. As there was a manifest Congressional purpose to avoid dual regulation, it was necessary to curtail the application of the Fair Labor Standards Act since "every expansion of the jurisdiction of the (Fair Labor Standards) Act through interpretation of paragraph 13 (b) (1) cuts down the jurisdiction of the Commission" (*Levinson* case, 330 U. S. at 682). No question of dual regulation is involved in considering the exemptions here in issue.

The other exemptions cited by appellant where the Administrator has allowed and the courts have approved a tolerance for nonexempt work, are ones where the exempt occupation is designated only by an undefined word or phrase rather than by a precise definition such as is provided in Section 3 (f) and in Section 7 (c). As it is felt that those exemptions were intended to apply to the typical situations or employees designated, the related activities typically found in those situations and occupations should not be regarded as defeating those exemptions. Thus Section 13 (a) (2) exempts employees employed in a "retail * * * establishment." Such establishments generally make a few non-retail sales. Consequently a tolerance has been held appropriate. This explains the decision in *Northwestern Hanna Fuel Co.* v. *McComb,* 166 F. (2d) 932 (C. C. A. 8); *Harris*

v. *Hammond,* 145 F. (2d) 333 (C. C. A. 5), certiorari denied 324 U. S. 859; and *Brown* v. *Minngas Co.,* 51 F. Supp. 363 (D. Minn., 1943).

The Administrator is firmly of the opinion that the tolerance specifically provided by the particularized language of the agricultural exemptions need not be broadened to accomplish the purposes of these exemptions, whereas the tolerances permitted in certain other sections are necessary to give substance to those sections.

CONCLUSION

The judgment of the court below should be modified in accordance with the views herein expressed, and, as so modified, affirmed.

Respectfully submitted.

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NOVEMBER 1948.

APPENDIX

U. S. Department of Labor

Wage and Hour and Public Contracts Divisions

OVERTIME EXEMPTIONS FOR PROCESSING OF AGRICULTURAL COMMODITIES CLARIFIED UNDER WAGE-HOUR LAW

[For Release Monday, January 25, 1943]

A clarification of the interpretations of the exemptions from the hours provisions of the Fair Labor Standards Act provided by section 7 (c) of the Act was issued today by L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor. The clarification deals with the Division's position on processing of agricultural commodities. It is the result of certain judicial decisions and the Division's experience with economic and administrative problems relating to these exemptions, and is intended to effectuate more completely the intent of Congress as evidenced by the terms of the statute.

Mr. Walling stated that any revised interpretations contained in the clarification which involve a narrowing of the exemption would not be adopted for enforcement purposes until March 1, 1943. This will give the industries affected an opportunity to appraise the effect of the changes, and to plan any modification of their operating methods which they may deem appropriate, without the risk of governmental action based upon failure to comply with the Division's interpretations as revised. He also pointed out, however, that his enforcement policy could not of

course bar the right of employees to maintain independent suits under section 16 (b) of the Act.

Section 7 (c) provides that "in the case of an employer engaged" in certain described operations on seasonal agricultural commodities, the overtime provisions of the Act "shall not apply to his employees in any place of employment where he is so engaged." The exemption extends throughout the year for some types of operations, but is limited to 14 workweeks annually for others.

A. Employees Who Are Exempt

In the case of *Fleming* v. *Swift & Co.,* 41 F. Supp. 825 (N. D. Ill.), the Court held that the exemption provided by section 7 (c) for "handling, slaughtering, or dressing * * * livestock" is applicable to those employees who are actually engaged in such operations, and, in addition, to "any employee whose employment during any workweek is wholly within the place of employment, as herein defined, and who during that workweek is working exclusively in an occupation which is a necessary part of the handling, slaughtering, or dressing of livestock." "Place of employment" was defined as "those portions of the plant devoted by the employer to the handling, slaughtering, or dressing of livestock."

Since all of the exemptions provided by section 7 (c) are phrased in the same general language and since they are all applicable to the packing or processing of seasonal agricultural commodities, the Administrator has concluded that the holding of the Court quoted above not only applies to the handling, slaughtering, or dressing of livestock, but also to all of the other section 7 (c) exemptions. It is therefore his opinion that the section 7 (c) exemptions are applicable to the following two groups of em-

ployees: (1) those who actually perform the operations described in the section, and (2) those employees whose occupations are a necessary incident to the described operations, and who work solely in those portions of the premises devoted by their employer to the described operations. Only those employees who came within one or the other of these two categories are exempt.

When an establishment is exclusively engaged in performing operations specifically mentioned in section 7 (c), every employee working in such a plant either will be actually engaged in the described operations, or else will be engaged in an occupation which is a necessary incident to the described operations and working solely in a portion of the premises devoted by his employer to such operations. Therefore, when an establishment is exclusively engaged in activities enumerated in the section, all of the employees of the operator of the establishment who work solely in that establishment, including office employees, watchmen, maintenance workers and warehousemen, come within the scope of these exemptions. In such a situation, the exemptions also apply to those employees of the plant operator whose duties consist of hauling agricultural commodities from the fields or from receiving stations to the plant for packing or processing, and to those who transport to market or to carriers for transportation to market goods upon which exempt operations have been performed in the plant. See also *Walling* v. *Bridgeman-Russell Co.,* F. Supp. (D. Minn. 1942).

On the other hand, the section 7 (c) exemptions are inapplicable to any employee working in a packing or processing plant whose duties relate to goods upon which "canning," "packing" or other operations de-

scribed in the section have been performed in another plant. Such an employee is neither performing the operations described in the section nor is his work in relation to such goods a necessary part of the exempt operations performed in the plant where he works. Moreover, where warehousemen, office help, or other employees work in a building which is on separate premises from that on which the packing or processing plant is located, they do not work in the place of employment where their employer engages in activities described in the section, and therefore such employees are not exempt. However, a warehouse located across the street or across a railroad right-of-way from the packing or processing establishment may be considered part of the same premises.

The purpose of section 7 (c), as shown by the legislative debates, was to relieve processors and packers of seasonal agricultural commodities from the burden of paying overtime compensation during those peak seasons of the year when large fluctuating quantities of perishable agricultural commodities move from the farms to the processing establishments, which commodities must be processed as soon as they arrive. It therefore seems that the taking of the section 7 (c) exemptions during the dead season is contrary to the legislative intent, and in the opinion of the Administrator these exemptions may not be taken in regard to any employee during periods of the year in which the plant is not actually engaged in operations described in the section. The Division has consistently followed this interpretation since the effective date of the Act and it was recently sustained in *Heaburg* v. *Independent Oil Mill, Inc.,* 5 Wage Hour Rept. 777 (W. D. Tenn. 1942).

To summarize, the following general rules govern the application of the section 7 (c) exemptions:

> If an employer does not himself carry on any of the operations specifically mentioned in section 7 (c), none of his employees come within the scope of the exemptions. If he does carry on such operations, the following two groups of employees are exempt:
>
> (1) those who exclusively engage in the operations described in the section; and
>
> (2) those employees whose occupations are a necessary incident to the described operations, and who work solely in those portions of the premises devoted by their employer to the described operations. When a plant exclusively engages in activities enumerated in the section, all of the employees of the operator of the plant who work solely in that plant are exempt. On the other hand, employees whose duties relate to goods upon which the described operations have been performed in another plant and employees working in a building which is on separate premises from that on which the exempt plant is located do not fall within either of the two groups of exempt employees and hence are not exempt. An employer may take the section 7 (c) exemptions only during periods in which he is actually engaged in performing operations described in the section.

B. Independent Contractors

The following general rule can be laid down in regard to the application of the section 7 (c) exemptions to employees of independent contractors:

> Where an independent contractor is engaged by a packer or canner or other processor of agricultural commodities to perform operations in a packing or processing establishment, the employees of the independent contractor do not come within the section 7 (c) exemption unless

the independent contractor actually carries on an operation which falls within the scope of the terms "canning," "packing," "first processing," or any other operation described in section 7 (c) so as to be entitled to the exemption in his own right as a canner, packer, etc. If the contractor is so engaged, the exemption is applicable (1) to those of his employees who perform the operations described in section 7 (c), and (2) to those of his employees whose occupations are a necessary incident to the described operations, and who work solely in those portions of the premises devoted by their employer to those operations.

C. Particular Operations

It sometimes requires careful analysis to determine whether certain activities come within the scope of the operations specifically mentioned in section 7 (c). This release will deal with some of these problems which are of the most common occurrence and which involve the largest number of employees.

1. Labeling, Stamping, and Boxing of Canned Fresh Fruits and Vegetables

The Administrator is of the opinion that the labeling, stamping, and boxing of canned fresh fruits and vegetables, and other similar activities performed in connection with canned goods, are not "canning * * * perishable or seasonal fresh fruits or vegetables" unless these activities follow immediately after the hermetic sealing and cooling of the cans. Where the labeling, stamping, and boxing occur immediately after the hermetic sealing and cooling, the employees engaged in these activities are exempt, regardless of whether they are employed by the canner or by an independent contractor. If these operations are not performed immediately after the hermetic sealing

and cooling, they are not "canning" within the meaning of section 7 (c), and if the labeling, stamping, and boxing are performed by employees of an independent contractor, the employer is not thereby engaged in any of the operations described in the section and therefore none of his employees is exempt. If the labeling, stamping, and boxing do not follow immediately after the sealing of the cans but are performed during the active season by employees of the canner, the workers engaged in such operations are exempt, provided that these operations are conducted in those portions of the premises devoted by their employer to canning. Where an establishment is solely engaged in the canning of fresh fruits and vegetables, the labeling, stamping, and boxing of the canned goods during the active season by employees of the canner are exempt operations if performed in the cannery or in a warehouse located on the same premises as the cannery.

On the other hand, activities performed in a warehouse located on premises separate from the cannery are not conducted in the place of employment where the canning is done, and the exemption is inapplicable to all of the employees working in such a warehouse. Furthermore, employees working on the cannery premises who handle or work on goods canned in another cannery are not exempt.

2. Cooling of Fresh Fruits and Vegetables

It is the position of the Administrator that the following cooling operations are part of "packing perishable or seasonal fresh fruits or vegetables": The precooling of the fresh fruits and vegetables in the packing plant by means of ice, water, or cold air; and the placing of layers of crushed ice in the crates with the fruits and vegetables. On the other hand, the placing of crushed ice on top of the filled crates after they

have been loaded into refrigerator cars for shipment; the blowing of water, cold air or ice over the packed fresh fruits and vegetables after they have been loaded in the cars; the recooling or bunker icing or reicing of refrigerator cars; and the cooling of empty cars before they are loaded with filled crates are not "packing" fruits and vegetables.

If cooling operations are of the type described above as constituting "packing," the employees engaged in such operations are exempt, whether they are employees of the packer or of an independent contractor. On the other hand, if the cooling activities are those described above as not constituting "packing" and are performed by an independent contractor, the employees engaged in such activities are not exempt. Where the cooling activities do not constitute "packing" but are performed by employees of the packer, such employees come within the scope of the exemption, provided that these activities are conducted solely in those portions of the premises devoted by their employer to packing. Thus, where an establishment is solely engaged in the packing of fresh fruits or vegetables and refrigerator cars are spotted on tracks adjoining the plant, the employees of the packer engaged in the bunker icing or in cooling cars solely for use in shipping fresh fruits and vegetables packed in that establishment are exempt.

3. Assembling Box Shook Used in Packing Fresh Fruits and Vegetables

The Administrator is of the opinion that the assembling of box shook for use in packing fresh fruits and vegetables constitutes "packing" if performed in the packing house as part of a continuous operation with the packing of such fruits and vegetables. If so performed by employees of an independent contractor,

they are engaged in packing. The exemption also applies to employees of the packing house operator who, during the active season, assemble box shook solely in the portions of the premises devoted to packing, even if assembling the shook does not immediately precede the packing as part of a continuous operation. If the plant is used solely to pack fresh fruits and vegetables, the assembling of box shook by employees of the packer is exempt when performed during the active season solely in the packing plant or in a warehouse located on the same premises.

4. Manufacturing Cans, Ice and Boxes for Use in Canning and Packing Fresh Fruits and Vegetables

The manufacture of cans for use in canning fresh fruits and vegetables is not "canning," and, in the opinion of the Administrator, such manufacturing is too far removed to be considered "a necessary part" of canning. Accordingly, the manufacture of cans is not exempt, even though performed by a canner on the cannery premises solely for his use in canning fresh fruits or vegetables. For the same reasons, the manufacture of ice and of boxes and box shook for use in packing fresh fruits and vegetables is not exempt.

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Insofar as Interpretative Bulletin No. 14, the general instructions issued for the canning and packing drives of 1941, release R–1561, and any other interpretations issued by the Division are inconsistent with the opinions expressed above, the prior interpretations should be regarded as hereby superseded. However, this press release is not intended to supersede the Division's Interpretative Bulletin No. 14. That bulletin remains in effect except as it has been or may be modified by official statements of the Division.

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